

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BRUCE CORKER d/b/a RANCHO ALOHA;
COLEHOUR BONDERA and MELANIE
BONDERA, husband and wife d/b/a
KANALANI OHANA FARM; and ROBERT
SMITH and CECELIA SMITH, husband and
wife d/b/a SMITHFARMS, on behalf of
themselves and others similarly situated,

Plaintiffs,

v.

COSTCO WHOLESALE CORPORATION, a
Washington corporation; AMAZON.COM,
INC., a Delaware corporation; HAWAIIAN
ISLES KONA COFFEE, LTD., LLC, a
Hawaiian limited liability company; COST
PLUS/WORLD MARKET, a subsidiary of
BED BATH & BEYOND, a New York
corporation; BCC ASSETS, LLC d/b/a
BOYER'S COFFEE COMPANY, INC., a
Colorado corporation; L&K COFFEE CO.
LLC, a Michigan limited liability company;
MULVADI CORPORATION, a Hawaii
corporation; COPPER MOON COFFEE, LLC,
an Indiana limited liability company; GOLD
COFFEE ROASTERS, INC., a Delaware
corporation; CAMERON'S COFFEE AND
DISTRIBUTION COMPANY, a Minnesota
corporation; PACIFIC COFFEE, INC., a
Hawaii corporation; THE KROGER CO., an
Ohio corporation; WALMART INC., a
Delaware corporation; BED BATH &

Case No. 2:19-cv-00290

**PLAINTIFFS' OPPOSITION TO
CAMERON'S COFFEE AND
DISTRIBUTION COMPANY, GOLD
COFFEE ROASTERS, INC., AND THE
KROGER CO.'S MOTION TO COMPEL
DISCOVERY**

Noted for Consideration:
June 19, 2020

PLAINTIFFS' OPPOSITION TO CERTAIN
DEFENDANTS' MOTION TO COMPEL
(No. 2:19-cv-00290-RSL)

#1323110 v1 / 72448-001

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1 BEYOND INC., a New York corporation;
2 ALBERTSONS COMPANIES INC., a
3 Delaware Corporation; SAFEWAY INC., a
4 Delaware Corporation; MNS LTD., a Hawaii
5 Corporation; THE TJX COMPANIES d/b/a T.J.
6 MAXX, a Delaware Corporation;
7 MARSHALLS OF MA, INC. d/b/a
8 MARSHALLS, a Massachusetts corporation;
9 SPROUTS FARMERS MARKET, INC. a
10 Delaware corporation; COSTA RICAN GOLD
11 COFFEE CO., INC., a Florida corporation;

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Defendants.

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1 Plaintiffs are farmers who grow and sell coffee in the Kona District on the Big Island of
 2 Hawaii. Defendants are businesses that sell and distribute coffee labeled as “Kona Coffee,” “100%
 3 Kona,” and “Kona Blend,” although their labels are false or misleading. In anticipation of litigation,
 4 Plaintiffs conducted comprehensive scientific testing to determine which products on the market
 5 were labeled “Kona coffee” accurately. Plaintiffs filed suit only against manufacturers and retailers
 6 whose products were deceptive. These Plaintiffs now ask the Court to deny Defendants’ Motion to
 7 Compel three categories of information.
 8

9 In their motion, Defendants primarily request *all* scientific testing about coffee from
 10 Plaintiffs’ consulting experts regardless of relevance, privilege, or work product. While any
 11 testifying expert witnesses must, of course, produce their materials in accordance with this Court’s
 12 orders and the federal rules, Defendants give no reason that the Court should order disclosure prior
 13 to that time, much less for disclosure of work product specifically protected by the Federal Rules.
 14 This is particularly so because Defendants know the origin of all the coffee in their products with
 15 a Kona label. Defendants do not need Plaintiff’s scientific testing data to prove what they already
 16 know: they put little to no authentic Kona coffee in their products.

17 Defendants also seek broad categories of discovery going back more than a decade. This
 18 request, too, should be rejected. Defendants ostensibly seek these documents to support a defense
 19 of laches. But there are no documents demonstrating that Plaintiffs had knowledge of claims
 20 against these Defendants because Plaintiffs did not have knowledge of their claims against these
 21 defendants (nor could Plaintiffs have had such knowledge). In any event, if Defendants may seek
 22 pre-2015 discovery in support of a ill-founded laches defense, Plaintiffs must also be permitted
 23 discovery from that same period, both to counter Defendants’ laches defense and establish tolling
 24 of the statute of limitation. Yet Defendants flatly refuse to produce any pre-2015 discovery. It
 25 would be unfair to permit Defendants to attempt to establish laches without also requiring them to
 26 produce the evidence that would show their own culpability from that same time period.

Defendants' motion concludes by seeking information in Plaintiffs' possession identifying individual class members and otherwise delving into class member identities, going so far as to suggest that understanding the "identity" of class members is relevant. Defendants offer no coherent argument that this information is relevant. To the contrary, Defendants' attempt to turn a proposed class action into discovery into each of the 600-1000 individual farmers is improper, and Defendants offer no case in which a court has permitted a defendant such extraordinary discovery.

I. PROCEDURAL HISTORY

A. Many Defendants Have Produced Few Documents, and None Have Produced Documents Pre-Dating 2015.

Obtaining relevant information from the Defendants has been difficult. Lichtman Decl. at ¶ 4-6. They have uniformly refused to provide any pre-2015 discovery regardless of relevance. *Id.*, Exs. A at 1, B at 3, D at 1. Albertson's/Safeway has produced only a single document in response to Plaintiffs' multiple rounds of discovery requests. *Id.* at ¶5(c). Amazon has produced only two documents and has dragged its feet on producing third-party sales data. *Id.*, Ex. C at 2. Amazon and Walmart have refused to provide international sales data despite having no legal basis to refuse such production. *Id.* at ¶5(d). TJ Maxx provided only a fraction of the requested sales and costs data, claiming it does not keep sales records for more than a year. *Id.* at ¶5(f). While meet and confers typically result in a trickle of additional documents, the glacial pace of discovery has caused a needless waste of resources.

Supplier Defendants have been similarly intransigent. Gold claims not to keep records of sales data at all and has produced only purchase orders beginning from the date of its receipt of a litigation hold letter from Plaintiffs served with the Complaint in February 2019. *Id.* at ¶5(g). Mulvadi has refused to produce any responsive documents beyond a couple of labels. *Id.* at ¶5(h). Only a few defendants have produced reports indicating the percentage of Kona coffee in their blends, which is information they are required to maintain by law and is central to this dispute. *Id.*

1 at ¶5(i). Documents and other discovery produced thus far, however, demonstrate that there is
 2 little to no Kona Coffee in Defendants' products. *Id.* at ¶5(j).

3 **B. Defendants Have Served Voluminous, Disproportionate Discovery.**

4 Plaintiffs are three small farms, none owned by more than a husband and wife. Yet
 5 Defendants have collectively served over 100 Requests for Production of Documents ("RFPs"), 20
 6 Interrogatories ("ROGs"), and approximately 90 Requests for Admission ("RFAs"). *Id.* at ¶6. In
 7 responding to these discovery requests, Plaintiffs collected and reviewed 66,503 pages of hard copy
 8 documents, reviewed 32,680 ESI documents, and are in the process of reviewing an additional
 9 144,903 ESI documents. *Id.* at ¶4. Plaintiffs have currently produced a total of 7,062 documents
 10 (14,388 pages). Defendants have thus already forced Plaintiffs to expend an extraordinary amount
 11 of effort reviewing information with no relevance to this case at all. *Id.*¹

12 **C. Plaintiffs Offered to Compromise to Avoid the Primary Dispute Before the Court.**

13 Throughout the meet and confer process, Plaintiffs offered to compromise on disputed
 14 issues. *See, e.g., id.*, Exs. A, B at 2, C. When Defendants requested expert analysis, for example,
 15 Plaintiffs explained that Defendants were only entitled to expert material that would be used to
 16 support trial testimony. *See id.*, Ex. B at 2 (relying on *Dover v. British Airways, PLC (UK)*, 2014
 17 U.S. Dist. LEXIS 143995, at *3 (E.D.N.Y. Oct. 9, 2014)). Defendants countered that other cases,
 18 including *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 314 F.R.D. 85 (S.D.N.Y. 2016) and
 19 *Zeiger v. Wellpet LLC*, 2018 U.S. Dist. LEXIS 110439, at *12-13 (N.D. Cal. June 29, 2018)
 20 indicated that Plaintiffs *did* need to produce expert evidence if they relied on that evidence in the
 21 Complaint.
 22

23 Plaintiffs offered to compromise by producing the scientific testing referenced in the
 24 Complaint so long as Defendants did not seek additional expert information prior to expert
 25

26 ¹ Plaintiffs review has not been limited to documents dated after 2015 - 35,809 pages of the hard copy documents that have been reviewed date from earlier than 2015, as do 17,779 ESI documents. *Id.* at ¶ 4. 58,234 of the ESI documents in the review queue date from before 2015. *Id.* Of the documents already produced, 519 (1,103 pages) are dated pre-2015. *Id.*

discovery. *Id.* This was a very reasonable compromise given that two of Defendants' cases indicated that this was the only thing that Plaintiffs were required to produce even if they *lost* a motion to compel. *Id.* Defendants rejected this offer, insisting on *all* expert work product. *Id.*, Exs. A at 1; B at 1, 2; D at 2. In other words, Defendants refused to accept Plaintiffs suggestion that the parties agree to follow two of the cases Defendants cited.

D. Plaintiffs Agreed to Produce Many Pre-2015 Documents.

While Plaintiffs do not agree that they should have to produce documents prior to 2015 given that Defendants are refusing to produce such documents, Plaintiffs *did* ultimately agree to produce many of the documents that Defendants requested. This includes documents about their lobbying activities and any documents that indicated suspicion about counterfeiting in general (not the standard for laches). *See id.*, Ex. B at 4. Despite this, Defendants still refuse to produce any of their own pre-2015 documents relevant to laches.

II. ARGUMENT

For years, Defendants wrongfully passed off ordinary commodity coffee as "Kona" coffee. Dkt. 271 (SAC) ¶ 2. When Defendants flooded the market with that coffee, they wrongfully profited from Plaintiffs' hard work, drove down the price of real Kona coffee, impeded the sale of genuine Kona coffee, and harmed the reputations of honest farmers. Dkt. 271 ¶ 2-3.

All information that could prove the deception, i.e. the origin of the coffee contained in the accused products, has long been in Defendants' exclusive control. Dkt. 271 ¶ 36. The type of testing required to determine the provenance of a coffee bean is expensive, and very few labs have the capability to perform it. Dkt. 271 ¶ 35. Plaintiffs were only able to have the testing performed in the months leading up to this litigation. Dkt. 271 ¶ 35. They used that testing to determine which coffee products on the market accurately or falsely designated Kona as the origin. When Plaintiffs filed their Complaint, they included those test results in the Complaint in the form of graphical representations of elemental abundance ratios showing that the coffee in the accused products had a chemical composition that was not consistent with coffee from Kona. Dkt. 271 ¶¶ 22-58.

1 While the scientific testing was necessary to identify which coffee products falsely
 2 designated the origin of the contents, the scientific testing is unlikely necessary to prove Plaintiffs'
 3 case at trial. Instead, Plaintiffs need only rely on the discovery from Defendants showing the origins
 4 of the coffee in the product and the *de minimis* amount of Kona coffee therein. For Defendants that
 5 have produced documents or interrogatory answers revealing the contents of their accused coffee
 6 products, discovery has confirmed the pleadings.
 7

8 **A. Defendants Are Not Entitled to Pre-Litigation Scientific Investigation Because It Is**
 9 **Consulting Expert Opinion.**

10 Plaintiffs have told Defendants that Plaintiffs will not produce documents "created by, or
 11 in the possession of, any expert witnesses." Lichtman Decl., Ex. A at 3. Plaintiffs' refusal is
 12 appropriate: neither party has yet disclosed any testifying experts under the scheduling order. In
 13 other words, Defendants seek discovery from Plaintiffs' consulting experts. Such material is
 14 protected from disclosure under Rule 26(b)(4)(D), which "creates a safe harbor whereby facts and
 15 opinions of non-testifying, consulting experts are shielded from discovery except upon a showing
 16 of exceptional circumstances." *United States Inspection Servs. v. NL Engineered Sols., LLC*, 268
 17 F.R.D. 614, 617 (N.D. Cal. 2010) (quotation omitted).

18 Rule 26(b)(4)(D) provides in pertinent part:

19 Ordinarily, a party may not, by interrogatories or deposition, discover facts known
 20 or opinions held by an expert who has been retained or specially employed by
 21 another party in anticipation of litigation or to prepare for trial and who is not
 22 expected to be called as a witness at trial. But a party may do so only...(ii) on
 showing exceptional circumstances under which it is impracticable for the party to
 obtain facts or opinions on the same subject by other means.

23 The policy considerations of this rule include encouraging the rigorous and open investigation of
 24 one's case, pre-filing, without subjecting the results or process of that investigation to adversarial
 25 scrutiny. *See Plymovent Corp. v. Air Tech. Sols., Inc.*, 243 F.R.D. 139, 143 (D. N.J. 2007); *see*
 26 *also Murray v. S. Route Mar., S.A.*, 2014 U.S. Dist. LEXIS 58852, at *2 (W.D. Wash. Apr. 28,
 2014) (Lasnik, J.) ("The right to keep the opinions of non-testifying experts secret is based on the
 same concerns that motivate the work product doctrine: counsel must have a safe space in which

1 to investigate, analyze, and prepare his client's case without fear that the opposing party will be
2 able to exploit his efforts").

3 Courts have recognized that these protections afforded to consulting experts are rooted in
4 the fairness doctrine, thus Rule 26(b)(4)(D)'s protections are not considered waivable and
5 compelling discovery from non-testifying consulting experts is impermissible. *See NL Engineered*
6 *Sols.*, 268 F.R.D. at 624 (surveying cases and legal authorities for the proposition).

7 Viewed under this lens, Defendants are not justified in obtaining the Complaint
8 investigation *at all* because they do not need discovery on evidence that will not be presented at
9 trial (or summary judgment) and thus requires no rebuttal. *That* evidence will come from
10 Defendants' own discovery responses and potentially a scientific testifying expert, from whom
11 Defendants can seek discovery as permitted by the Federal Rules and scheduling order. *Dover* is
12 squarely on point. 2014 U.S. Dist. LEXIS 143995, at *3, *5 (consulting expert analysis underlying
13 complaint should not be produced if plaintiffs are not relying on that analysis at trial). Put simply,
14 Defendants suffer no prejudice if the Complaint investigation is withheld.

15 Defendants, however, seek the identification of "each coffee product tested" (whether
16 referenced in the complaint or not) and the production of "all documents relating to testing alleged
17 in the Complaint", "all documents relating to all testing you have done on any other products", and
18 "all scientific studies you have commissioned or reviewed relating to the origin or content of coffee
19 products[.]" Dkt. 257 at 17-18 (ROG 6 and RFPs 8, 9 & 13). None of these requests limit their
20 scope to data, documents, or information that Plaintiffs referenced in the Complaint, much less that
21 Plaintiffs will use to support their case at trial.² They simply are not entitled to this. *See Dover*,
22 2014 U.S. Dist. LEXIS 143995, at *3.

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24
25 ² Plaintiffs objected to ROG 6 and RFPs 8, 9, 10, 13, 47-50 on the basis of "attorney-client privilege, work
26 product protection, Rule 26(b)(2), and premature [expert discovery]." Dkt. 257 at 17-21. Plaintiffs objected to RFPs
45, 46, and 51-63 on the basis that the requests are "Premature." Dkt. 257 at 19-21. All of the aforementioned requests
seek information concerning Plaintiffs' scientific testing of products. Contrary to Defendants' position, relevance is
not the basis for Plaintiffs' objection to the production of the scientific testing information. As illustrated in
Defendants' Appendix A to their motion, Plaintiffs have objected to only two discovery requests at issue on the basis
of relevance. Dkt. 257 at 17. Neither pertained to scientific testing. Those two objections were in response to
Defendants' request that Plaintiffs "produce all documents and communications relating to any attempts or efforts to

1 **1. Plaintiffs' Scientific Testing Data Is Not Discoverable.**

2 Plaintiffs contend that the scientific testing performed by their consulting expert in
3 Plaintiffs' prelitigation investigation is not discoverable. In *Dover*, the plaintiffs relied on a
4 particular scientific analysis in its complaint and in opposition to a motion to dismiss but then
5 disclaimed any future reliance; instead they ultimately conducted a different analysis with different
6 data and sought work product protection for the original analysis. 2014 U.S. Dist. LEXIS 143995,
7 at *3, *5. The court found that because the original analysis would not be an issue at trial there
8 was no compelling reason it should be disclosed. *Id.* at 5.

9 Here, because Plaintiffs can prove the contents of Defendants' accused products through
10 documents produced and admissions made by Defendants, they do not anticipate the need to use
11 the scientific testing identified in the Complaint at trial. Therefore, consistent with the holding in
12 *Dover*, the scientific testing qualifies for work product protection and is not discoverable. This case
13 is even more compelling than *Dover* because Defendants did not put the analysis at issue in their
14 motion to dismiss.

15 **2. If the Court Finds That Plaintiffs Must Produce Expert Evidence, Plaintiffs**
16 **Should Only Be Ordered to Produce Expert Evidence Relied On in the**
17 **Complaint.**

18 Even when courts find "exceptional circumstances" meriting disclosure under Rule
19 26(b)(4)(D)'s protections, courts apply waiver narrowly and compel discovery only of information
20 specifically identified in a given complaint (i.e., the exact compromise Plaintiffs offered
21 Defendants). For example, in one case Defendants' cite, the court held specifically that the
22 plaintiffs had "no obligation to disclose other testing or communications with or opinions by
23 consulting experts beyond that specifically referenced in the [complaint]." *Zeiger v. WellPet LLC*,
24 2018 U.S. Dist. LEXIS 110439 (N.D. Cal. June 29, 2018). In sum, if the *Zeiger* court is correct

25 _____
26 contact members of the putative class," and produce "all documents and communications reflecting the number or
percentage of the putative class that sell, desire to sell, or wish to have their coffee used in only 100% Kona coffee
products." Dkt. 257 at 18. These objections are further addressed in Section C. Nevertheless, Defendants have made
relevance their primary basis for their demand for the scientific evidence. *See* Dkt. 257 at 9. Even assuming *arguendo*
that the requested material is relevant, Defendants' motion must be denied because they have failed to satisfy their
burden of showing the work product is discoverable.

1 and the *Dover* court is wrong, Plaintiffs still must only produce the information from the
2 Complaint.

3 Defendants, however, contend that because Plaintiffs included graphs illustrating the
4 chemical difference between authentic Kona coffee and the coffee in Defendants' products, the
5 Court should find that Plaintiffs' waived all work product protections for any scientific testing
6 performed in anticipation of litigation. Defendants even demand the test results for products of
7 non-parties. Defendants have not cited any legal authority to support such a broad application of
8 waiver of work product and the law even they cite is directly to the contrary.

9 Defendants also rely upon *Worley v. Avanquest N. Am., Inc.*, 2013 U.S. Dist. LEXIS 175305
10 (N.D. Cal. Dec. 13, 2013). But the *Worley* court recognized that any departure from the ordinary
11 rules regarding expert discovery is not "without limitation." *Id.* at 17. In fact, cases cited by the
12 *Worley* court support Plaintiffs' position for a limited waiver. All limited the discovery to the
13 specific disclosed statements and no further. *See Sims v. Metro. Life Ins. Co.*, 2006 U.S. Dist.
14 LEXIS 10067, at *3 (N.D. Cal. Dec. 27, 2006) (statements in expert declarations); *Hollinger Int'l*
15 *Inc. v. Hollinger Inc.*, 230 F.R.D. 508, 521-22 (N.D. Ill. 2005) (disclosed portion of expert report);
16 *Ludwig v. Pilkington N.A., Inc.*, 2003 U.S. Dist. LEXIS 17789, at *3 (N.D. Ill. Sept. 29, 2003)
17 (disclosed material only).
18

19 This Court's decision in *Murray* is instructive. 2015 U.S. Dist. LEXIS 58852, at *4-5. In
20 *Murray*, plaintiffs disclosed an expert report to settle a third-party dispute and then sought to
21 protect the disclosed report as work product in another matter. This Court found that plaintiffs in
22 that case needed to produce the specific disclosed document, but held that plaintiffs had "preserved
23 the confidentiality of the *underlying examination records and any unreported facts or opinion held*
24 *by the examining experts.*" *Id.* at *8 (emphasis added). The Court held that "[w]hile a party cannot
25 shield the material which it has already disclosed or on which its witnesses rely, where the
26 disclosure is limited, the waiver applies only to the matters disclosed or relied upon." *Id.* at 9.

Defendants contend in their brief that “it would be unfair to allow a party to use expert testimony as both a sword and a shield.” Plaintiffs agree, but Plaintiffs are attempting no such thing. Plaintiffs may not need to rely on any scientific testing at trial given Defendants’ documents and discovery responses, and Plaintiffs will fully disclose any expert evidence on which they *will* rely consistent with the Court’s scheduling order. As such, consistent with *Dover*, Plaintiffs need not disclose consulting expert investigation to Defendants merely because Plaintiffs referenced scientific analysis to establish that their claims were plausible. Defendants’ motion to compel should thus be denied. Otherwise, consistent with the very cases Defendants’ cite, Plaintiffs should be ordered to produce only the scientific data identified in the Complaint.

B. Defendants Are Not Entitled to Pre-2015 Discovery, Particularly Because Defendants Themselves Refuse to Produce Such Discovery.

When Plaintiffs propounded their first set of discovery requests, Defendants refused provide any documents outside of the statute of limitations period. Plaintiffs argued that under theories of fraudulent concealment and estoppel, the statute of limitations was tolled and thus certain discovery from prior to the statute was appropriate.³ The parties ultimately agreed to produce discovery for the period four years prior to the filing of the Complaint; i.e., 2015. Defendants now contend that they need discovery from Plaintiffs dating back before 2015 to support their laches defense, *but they continue to refuse to produce any of their own pre-2015 documents, including those relevant to laches.*

Plaintiffs cannot agree that Defendants are free to seek pre-2015 discovery to support their defenses while Plaintiffs are prejudiced by Defendants refusal to produce any pre-2015 discovery that could be used to rebut that same defense. This is particularly so because pre-2015 discovery is relevant to Plaintiffs’ fraudulent concealment and estoppel defenses for equitable tolling of the limitations period. And if the parties are ordered to produce pre-2015 discovery, such discovery

³ The Lanham Act does not have a statute of limitations. Courts typically look to the analogous state law for guidance on the appropriate limitations period. The parties disagree on which state law is most analogous to the claims in this case.

1 should be narrowly tailored to be focused (mutually) on laches, unclean hands, and equitable tolling
 2 of the statute of limitations. But there is no basis to grant Defendants' motion, awarding them free-
 3 ranging pre-2015 discovery while they refuse to provide even a single pre-2015 document.

4 **C. Defendants Should Not Be Permitted to Seek Irrelevant, Harassing, and Unduly**
 5 **Burdensome Discovery Into Absent Class Members.**

6 Defendants claim that they are entitled to discover information and documents relating the
 7 putative class members. The Supreme Court has ruled that identifying information of class
 8 members "may be appropriately disclosed to the *plaintiffs* to determine class members, but that
 9 [Federal Rule of Civil Procedure] 26(b) was not the vehicle to do so, more appropriately Rule 23."
 10 *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 355 (1978) (emphasis added). Indeed,
 11 defendants do not cite a single case in which a *defendant* has been granted license to embark on a
 12 fishing expedition into absent class members. *See* Dkt. 257 at 10.⁴ For good reason: it is well-
 13 established that discovery into absent class members is "disfavored." *Does I-10 v. Univ. of*
 14 *Washington*, No. C16-1212JLR, 2018 WL 3417017, at *2 (W.D. Wash. July 13, 2018) (Robart,
 15 J.); *see also, e.g., Pettenato v. Beacon Health Options, Inc.*, 425 F. Supp. 3d 264, 279 (S.D.N.Y.
 16 2019) ("Discovery of absent class members is rarely permitted" (citation omitted)).

17
 18 Regardless of what party is seeking the information, it must be relevant. *Oppenheimer*
 19 *Fund*, 437 U.S. at 352. And the specific identity of class members is emphatically *not* relevant to
 20 class certification, which "hinges on whether the identity of the putative class members can be
 21 objectively ascertained; *the ascertaining of their actual identities is not required.*" *Taylor v.*
 22 *Universal Auto Grp. I, Inc.*, 2014 U.S. Dist. LEXIS 164312, at *48 (W.D. Wash. Nov. 24, 2014)
 23 (emphasis added); *see also, e.g., Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 (9th Cir.
 24 2017).

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 26 ⁴ One of the cases defendants cited, *Wiegele v. FedEx Ground Package Sys.*, 2007 EL 628041, at *2 (S.D. Cal. Feb. 8, 2007), quoted *Koo v. Rubio's Rests., Inc.*, 109 Cal. App. 4th 719 (2003) where the California state court, in dicta, talked about "equal access" to putative class members. However, according to the court, the "decision addresses only the solitary issue before [the] court—whether the trial court abused its discretion in disqualifying Carlton." *Koo v. Rubio's Rests., Inc.*, 109 Cal. App. 4th 719, 736, 135 Cal. Rptr. 2d 415, 428 (2003).

Defendants, however, speculate that absent class members might have information relevant to Defendants' *substantive* defenses. But absent class members have information relevant to the litigation in *every* class action, and that does not justify such discovery. As one court in the Northern District of California summarized the law: "nearly every absent class member potentially possesses information relevant to certification. Nonetheless, discovery of absent class members is generally not permitted unless the class member has inserted herself into the litigation." *A.B. v. Pac. Fertility Ctr.*, No. 18-CV-01586-JSC, 2019 WL 6605883, at *1 (N.D. Cal. Dec. 3, 2019); *see also, e.g., In re Washington Mut. Mortg. Backed Sec. Litig.*, No. C09-37 MJP, 2011 WL 1789975, at *1 (W.D. Wash. May 9, 2011) (Pechman, J.) ("[D]iscovery from absent class members is 'generally disfavored' . . . (citation omitted)).

Far from showing particularized, special circumstances that would justify discovery into absent class members, Defendants instead make the speculative argument that they require Class Information because they seek "insight" into the class that might support their "substantive defenses." Dkt. 257 at 15. Defendants actually suggest that the farmers provide the identities of their "acquaintances and neighbors" to opposing counsel, and suggest Plaintiffs Colehour Bondera, Bruce Corker, and Cecelia Smith use their position on the board of the Kona Coffee Farmers' Association ("KCFA") to give Defendants access to their members. *Id.*⁵ No case supports providing Defendants such information. In this matter, relevance is tied to determining whether Defendants passed off lower quality coffee as "Kona" coffee. Defendants fail to explain how "insight" into the class members is relevant to their substantive defenses nor do they explain why they cannot perform their own investigations into the matter (they obviously can, they are in the course of doing so now).

⁵ Defendants *have already subpoenaed KCFA* requesting its membership list making this portion of their motion irrelevant and duplicative and further demonstrating that Defendants do not have a proper purpose for seeking this information beyond harassment. Lichtman Decl., Ex. E.

III. CONCLUSION

Defendants' Motion to Compel wanders far from the established norm. Defendants seek lopsided discovery time frames, expert discovery pre-deadline regarding testing of *their own* coffee, coffee purchase records for *their own* companies, prying into a nonparty nonprofit organization's membership, seeking identifying information regarding class members before the Court has even certified a class, and prematurely demand expert witness information and documentation. Plaintiffs thus ask that the Court deny Defendants' Motion to Compel.

Dated this 15th day of June 2020.

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Attorneys for the Plaintiffs and the Proposed Class

CERTIFICATE OF SERVICE

I, Julie Nesbitt, affirm and state that I am employed by Karr Tuttle Campbell in King County, in the State of Washington. I am over the age of 18 and not a party to the within action. My business address is: 701 Fifth Avenue, Suite 3300, Seattle, WA 98104. On this day, I caused to be filed with the Court a true and correct copy of the foregoing PLAINTIFFS' OPPOSITION TO CERTAIN DEFENDANTS' MOTION TO COMPEL, via the Court's electronic filing system, which caused service of the document to all parties registered to receive notifications through CM/ECF.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, to the best of my knowledge.

Dated this 15th day of June, 2020, at Seattle, Washington.

/s/ Julie Nesbitt
Julie Nesbitt, Legal Assistant